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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 CHRISTOPHER A. JONES,)
10 Petitioner,) 3:05-cv-00582-LRH-VPC
11 vs.)
12 E.K McDONALD, *et al.*,) **ORDER**
13 Respondents.)
14 _____)

15 This action proceeds on the Amended Petition for a Writ of Habeas Corpus pursuant to 28
16 U.S.C. §2254, by Christopher A. Jones, a Nevada prisoner represented by counsel. Before the Court
17 are respondents' "Motion to Dismiss and Answer to Petition for Writ of Habeas Corpus" (Docket
18 #15) and petitioner's Response (Docket #19).

19 **I. Factual and Procedural Background**

20 **A. State Court Proceedings**

21 Petitioner Jones was charged, in Nevada's Eighth Judicial District, with one count of First
22 Degree Murder with the Use of a Deadly Weapon, two counts of Attempted Murder with the Use of
23 a Deadly Weapon, and three counts of Discharging a Firearm at or into a Structure. (Exhibit 4).¹ At
24 the jury trial, petitioner was found guilty of First Degree Murder and was found not guilty as to all
25 other counts. (Exhibits 40-41). After the guilty verdict, Jones entered into a stipulation with the
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27 ¹ The exhibits referred to in this Order are located in the record of Jones' first federal petition,
28 CV-N-01-0038-DWH-VPC, at Docket #16, #17, #18, and #19. Petitioner has supplemented the record
with Exhibits 102-115 found in 3:05-CV-0582-LRH-VPC at Docket #3.

1 State wherein he waived his right to a direct appeal and a separate penalty hearing; he stipulated to a
 2 sentence of life with the possibility of parole for First Degree Murder, and a consecutive life with the
 3 possibility of parole for the Deadly Weapon enhancement. (Exhibit 43). On June 25, 1996, the state
 4 trial court adjudged petitioner guilty of First Degree Murder with Use of a Deadly Weapon and
 5 sentenced him according to the stipulation of the parties. (Exhibit 48). The Judgment of Conviction
 6 was entered on July 1, 1996. (Exhibit 49).

7 Petitioner did not pursue a direct appeal. On April 22, 1997, he filed a Motion to Withdraw
 8 from Stipulation and Order Waiving Separate Penalty Hearing and Waiving Appeal in the Eighth
 9 Judicial District Court (“Motion to Withdraw Stipulation”). (Exhibits 56, 57, and 59). Less than one
 10 month later, on May 14, 1997, petitioner filed a state post-conviction petition for writ of habeas
 11 corpus. (Exhibits 68 and 69). The State filed a joint opposition to both the Motion to Withdraw the
 12 Stipulation and to the state habeas petition. (Exhibit 71). Both matters were heard on June 10, 1997,
 13 and were denied. (Exhibits 74 and 76). The Findings of Fact, Conclusions of Law and Order was
 14 signed and filed by the state court on June 12, 1997. (Exhibit 74).

15 On July 9, 1997, petitioner filed a notice of appeal of the denial of his state habeas petition to
 16 the Nevada Supreme Court. (Exhibit 78). On July 29, 1997, the Court ordered that review of the
 17 complete record was warranted. (Exhibit 85). An opening brief was filed on December 15, 1997.
 18 (Exhibit 87). Nearly three years later, petitioner sought leave to file additional pages and an
 19 amended brief adding additional grounds to the original opening brief. (Exhibits 88, 89, and 90).
 20 The Nevada Supreme Court stamped these documents “received” on September 8, 2000. (Exhibit
 21 90). On September 11, 2000, one business day after it received petitioner’s motion to amend and
 22 amended brief, the Nevada Supreme Court entered its Order Dismissing Appeal. (Exhibit 91).
 23 Rehearing was denied on December 29, 2000. (Exhibit 93). Remittitur issued on January 17, 2001.
 24 (Exhibit 94).

25 Jones’ first federal petition for a writ of habeas corpus was filed on January 18, 2001, in case
 26 number CV-N-01-0038-DWH-VPC (Jones I). On April 9, 2002, petitioner filed the Second
 27 Amended Petition for a Writ of Habeas Corpus, setting forth eight grounds of relief. (Docket #26 in
 28 Jones I, CV-N-01-0038-DWH-VPC). The action was dismissed without prejudice to allow

1 petitioner an opportunity to exhaust Grounds Two (ineffective assistance of counsel for failure to file
2 an appeal) and Eight (ineffective assistance of counsel for failure to object to prosecutor's closing
3 argument). (Docket #37 and #43). On October 3, 2003, this Court entered a "stay-and-abey" order
4 allowing petitioner to return to state court to exhaust Grounds Two and Eight. (Docket #46).

5 Petitioner returned to the Eighth Judicial District Court of Nevada and filed a second post-
6 conviction petition raising three grounds for relief: (1) a due process violation resulting from
7 improper commentary, personal opinions, and disparagement of the defense in the prosecutor's
8 closing arguments; (2) denial of effective assistance of counsel because there was no objection to the
9 prosecutor's closing arguments; and (3) denial of effective assistance of counsel because counsel
10 failed to file a notice of appeal on petitioner's behalf. (Exhibit 93). On June 11, 2004, the state
11 district court entered its Findings, Conclusions, and Order denying the second habeas petition.
12 (Exhibit 109).

13 Petitioner appealed and the Nevada Supreme Court entered an order of affirmance on
14 March 26, 2005. (Exhibits 110 and 114). Remittitur issued on Jones's appeal on May 5, 2005.

15 **B. Federal Habeas Proceedings**

16 Jones's first federal petition for writ of habeas corpus was filed on January 18, 2001, in case
17 number CV-N-01-0038-DWH-VPC (Jones I). The petition was amended twice and ultimately
18 dismissed without prejudice and with leave to reopen to allow Jones an opportunity to exhaust
19 Grounds Two and Eight. Jones returned to this Court with a motion to reopen his federal habeas
20 corpus petition. (Docket #51). On October 26, 2005, this Court granted the motion to re-open and
21 the action was assigned the new case number 3:05-CV-0582-LRH-VPC (Jones II), Docket #1). On
22 November 30, 2005, an amended petition was filed incorporating the newly exhausted grounds for
23 relief and supplementing the record. (Docket #2; Exhibits, Docket #3). On February 13, 2006,
24 respondents filed a motion to dismiss the petition, claiming that Grounds 2-6, 8, and 9 of the petition
25 were procedurally defaulted. (Docket #8). By Order filed July 19, 2006, this Court granted the
26 motion, finding that Grounds 2, 3, 4, 5, 6, 8, and 9 of the Amended Petition were procedurally
27 defaulted in state court, and that petitioner had not made a showing of cause for the procedural
28 default. Claims 2, 3, 4, 5, 6, 8, and 9 of the amended petition were dismissed with prejudice.

1 Respondents were directed to file an answer as to the remaining claims in the amended petition,
 2 Grounds One and Seven. (Docket #10).

3 **II. The Instant Motion to Dismiss (Docket #15)**

4 In their motion, respondents contend that Ground Seven of the amended petition is an
 5 unexhausted claim, and further, that it would be procedurally barred if it is now presented to the state
 6 court, and therefore should be dismissed. In Ground Seven of the amended petition, petitioner
 7 alleges ineffective assistance of counsel (IAC) for trial counsel's failure to object to certain bad act
 8 evidence admitted at trial. (Docket #2, at pp. 31-33). Petitioner asserts that this claim was presented
 9 to the Nevada Supreme Court in Ground VIII of Appellant's Amended Opening Brief, at Exhibit 90.
 10 (Docket #2, at pp. 31-32). The Amended Opening Brief was received by the Nevada Supreme Court
 11 one business day before the Court entered its Order Dismissing Appeal. This Court previously
 12 determined that the claims presented in the Amended Opening Brief were not fairly presented to the
 13 Nevada Supreme Court, as follows:

14 [T]his court is even more convinced, after again reviewing the state court record, that
 15 Grounds Two and Eight are unexhausted. To demonstrate that these claims were
 16 fairly presented [to] the Nevada Supreme Court, petitioner relies on arguments he
 17 included in an "amended opening brief" to the state's highest court. Docket #19,
 18 Exhibit 90. Petitioner's initial opening brief was filed in that matter on December 15,
 19 1997. *Id.*, Exhibit 87. The amended brief which petitioner relies upon for exhaustion
 20 purposes was received by the Nevada Supreme Court nearly three years later on
 Friday, September 8, 2000. The Nevada Supreme Court filed its order dismissing the
 appeal on the next business day – September 11, 2000. *Id.*, Exhibit 91. As such,
 petitioner did not give the Court a fair opportunity to review his amended brief before
 the Court issued its decision. Consequently, this court cannot conclude that
 arguments contained in the amended brief effected state court exhaustion on Grounds
 Two and Eight. *See Solis v. Garcia*, 219 F.3d 922, 930 (9th Cir. 2000).

21 (Order, filed July 15, 2003, Docket #43, in Jones I, CV-N-01-0038-DWH-VPC). Ground Seven in
 22 the instant action (Jones II) was also presented to the Nevada Supreme Court in the Amended
 23 Opening Brief and this Court now finds that it similarly was not fairly presented to the Nevada
 24 Supreme Court. As such, Ground Seven is unexhausted.

25 In the response to the motion to dismiss, petitioner points out that Ground Seven of the
 26 instant petition is the same claim as Ground Seven in Jones I, CV-N-01-0038-DWH-VPC. (Docket
 27 #26, pp. 29-31). Petitioner argues that the State has waived the exhaustion defense because, in the
 28 prior motion to dismiss filed in Jones I, CV-N-01-0038-DWH-VPC, respondents only challenged

1 Grounds Two and Eight as unexhausted, but not Ground Seven. Petitioner contends that the failure
 2 to challenge Ground Seven in Jones I constituted the State’s “express waiver” of the exhaustion
 3 defense now asserted against Ground Seven of the instant petition.

4 The AEDPA provides that “[a] State shall not be deemed to have waived the exhaustion
 5 requirement or be estopped from reliance upon the requirement unless the State, through counsel,
 6 *expressly waives the requirement.*” 28 U.S.C. 2254(b)(3) (emphasis added). Exhaustion is a defense
 7 that the State can waive only *expressly*. *Id.*; *see Franklin v. Johnson*, 290 F.3d 1223, 1230-31 (9th
 8 Cir. 2002) (holding that while the exhaustion defense may only be waived expressly pursuant to §
 9 2254(b)(3), that statutory provision has no bearing on pre-AEDPA precedent regarding waiver of the
 10 procedural default defense); *see also Kunkle v. Dretke*, 352 F.3d 980, 989-991 (5th Cir. 2003) (failure
 11 to raise exhaustion defense in answer and arguing claim on the merits did not constitute express
 12 waiver by the State); *Lurie v. Wittner*, 228 F.3d 113, 123 (2nd Cir. 2000) (“cryptic observation” by
 13 State’s counsel that petitioner “did make these arguments in the appellate division” was not an
 14 express waiver of exhaustion of state remedies); *McNair v. Campbell*, 416 F.3d 1291, 1304 (11th
 15 Cir. 2005) (“the State’s failure to raise exhaustion does not constitute a waiver under the AEDPA”);
 16 *Hale v. Gibson*, 227 F.3d 1298, 1327, n.12 (10th Cir. 2000) (noting that, pursuant to § 2254(b)(3), the
 17 State may raise exhaustion at any time, including for the first time, on appeal).

18 In the instant case, petitioner cites no legal authority for the proposition that respondents’
 19 failure to assert the exhaustion defense in an earlier proceeding constitutes an express waiver by the
 20 State. This Court finds that respondents’ failure to raise the exhaustion defense earlier does not
 21 constitute an “express waiver” of the defense within the meaning of 28 U.S.C. § 2254(b)(3).

22 Petitioner further contends that this Court is bound by the “law of the case.” Petitioner
 23 asserts that this Court, in its Order of February 25, 2003, “treated” Ground Seven as an exhausted
 24 claim because it identified only Grounds Two and Eight of the petition in Jones I as unexhausted.
 25 (Order, filed February 25, 2003, in Jones I, CV-N-01-0038-DWH-VPC, at Docket #37). The Court
 26 rejects petitioner’s characterization of this Court’s treatment of Ground Seven. At that juncture,
 27 respondents had asserted the exhaustion defense only as to Grounds Two and Eight. This Court
 28 ruled on the issues before it and never made the determination that Ground Seven was exhausted.

1 (Order, filed February 25, 2003, in Jones I, CV-N-01-0038-DWH-VPC, at Docket #37).

2 This Court now finds that the State did not expressly waive the exhaustion defense with
 3 respect to Ground Seven of the instant petition. The Court further finds, as discussed *supra*, that
 4 Ground Seven was not fairly presented to the Nevada Supreme Court, and as such, is an unexhausted
 5 claim.

6 With respect to respondents' argument that Ground Seven should be dismissed as
 7 procedurally defaulted, this proposition goes too far. Respondents argue that if petitioner attempted
 8 to return to state court to exhaust Ground Seven, that the claim would likely be procedurally barred
 9 as untimely. NRS 34.726 provides that a petitioner may not bring a petition that challenges the
 10 validity of a judgment or sentence more than one year after entry of the judgment of conviction, or
 11 more than one year after the Supreme Court has issued its remittitur regarding a direct appeal,
 12 "unless there is good cause shown for the delay." Furthermore, the statute goes on to clarify that
 13 "good cause" exists if the petitioner can demonstrate to the court "(a) that the delay is not the fault of
 14 petitioner; and (b) that dismissal of the petition as untimely will unduly prejudice the petitioner."
 15 Petitioner can overcome the time limit in NRS 34.726 by demonstrating good cause. Petitioner's
 16 chance of obtaining a review of the merits of his unexhausted claim (Ground Seven) may be small,
 17 but it is not non-existent. To simply accept the assertion that petitioner would be procedurally
 18 defaulted upon his return to state court "would be to ignore the twin purposes of the exhaustion
 19 doctrine . . . (1) the consideration due a sovereign State's court's efforts to right federal constitutional
 20 wrongs and (2) the advantage, on federal habeas review, of a record fully developed in prior habeas
 21 proceedings in the state system." *Sechrest v. Ignacio*, 943 F. Supp. 1245, 1252 (D. Nev. 1996)
 22 (*citing Harris v. Reed*, 489 U.S. 255, 268-269 (1989)). As in *Sechrest*, this Court will not assume, as
 23 respondents urge, that petitioner could not persuade the Nevada Supreme Court to reach the merits of
 24 his unexhausted claim. Thus, while this Court finds that Ground Seven is unexhausted, the Court
 25 also finds that it is not appropriate to dismiss Ground Seven on procedural default grounds.

26 Finally, the Court notes that respondents also seek dismissal of Ground One of the amended
 27 petition on the merits. The Court will defer determination on the merits of Ground One until
 28 resolution of the exhaustion issue regarding Ground Seven.

1 **III. Conclusion**

2 Because the Court finds that the petition is a mixed petition, containing both exhausted and
 3 unexhausted claims, petitioner has several options. In the past, it has been the practice of this Court
 4 to permit a petitioner the option of abandoning his unexhausted claims and proceeding on the merits
 5 of those that are properly exhausted or voluntarily dismissing the action without the entry of
 6 judgment, to permit a return to state court. However, in *Rhines v. Weber*, 544 U.S. 269 (2005), the
 7 Supreme Court placed some limitations upon the discretion of this Court to facilitate habeas
 8 petitioners' return to state court to exhaust claims. The *Rhines* Court stated:

9 [S]tay and abeyance should be available only in limited circumstances.
 10 Because granting a stay effectively excuses a petitioner's failure to present his
 11 claims first to the state courts, stay and abeyance is only appropriate when the
 12 district court determines there was good cause for the petitioner's failure to exhaust
 13 his claims first in state court. Moreover, even if a petitioner had good cause for that
 14 failure, the district court would abuse its discretion if it were to grant him a stay
 15 when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2)
 16 ("An application for a writ of habeas corpus may be denied on the merits,
 17 notwithstanding the failure of the applicant to exhaust the remedies available in the
 18 courts of the State").

19 *Rhines*, 544 U.S. at 277.

20 Because petitioner's federal habeas petition is a mixed petition containing both exhausted and
 21 unexhausted claims, it must be dismissed by this Court. Prior to dismissing this case, however,
 22 petitioner will be provided the following three options:

- 23 1. He may submit a sworn declaration voluntarily abandoning the unexhausted
 24 claim in his federal habeas petition, and proceed only on the exhausted claim;
- 25 2. He may return to state court to exhaust his unexhausted claim, in which case
 26 his federal habeas petition will be denied without prejudice but will not be
 27 stayed during his return to state court; or
- 28 3. He may file a motion, pursuant to the requirements of *Rhines*, asking this
 29 Court to stay and abey his exhausted federal habeas claim while he returns to
 30 state court to exhaust his unexhausted claim.

31 Petitioner's failure to choose any of the three options listed above will result in his federal habeas
 32 petition being dismissed. Petitioner is also advised to be familiar with the limitations periods for
 33 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations periods may
 34 have a direct and substantial effect on whatever choice he makes regarding his petition.

1 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss (Docket
2 #15) is **GRANTED IN PART AND DENIED IN PART**, as follows: Respondents' motion is
3 granted to the extent that the Court concludes that Ground Seven of the federal habeas
4 petition is unexhausted. The motion to dismiss Ground Seven on procedural default grounds
5 is denied. The motion to dismiss Ground One is denied without prejudice and subject to
6 renewal of the arguments after resolution of the exhaustion issue regarding Ground Seven.

7 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** to do one of the
8 following: (1) inform this Court in a sworn declaration that he wishes to formally and forever
9 abandon the unexhausted ground for relief in his federal habeas petition (Ground Seven), and
10 proceed only on Ground One; **OR (2)** inform this Court in a sworn declaration that he wishes to
11 dismiss this petition without prejudice in order to return to state court to exhaust his unexhausted
12 claim; **OR (3)** file a motion pursuant to the requirements of *Rhines v. Weber*, 544 U.S. 269 (2005),
13 asking this Court to hold his exhausted claim in abeyance while he returns to state court to exhaust
14 his unexhausted claim (Ground Seven).

15 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted ground
16 (Ground Seven), respondents shall have **thirty (30) days** from the date petitioner serves his
17 declaration of abandonment in which to file an answer or response to petitioner's remaining ground
18 for relief (Ground One). Petitioner shall thereafter have **twenty (20) days** following service of
19 respondents' answer in which to file a reply.

20 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within the time
21 permitted, this case may be dismissed.

22 **IT IS FURTHER ORDERED** that the Court defers determination on the merits of Ground
23 One until after resolution of the exhaustion issue regarding Ground Seven.

24 Dated this 22nd day of August, 2007.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE